Supreme Court, U.S.
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No. 89-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL DEMOCRATIC POLICY COMMITTEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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September 27, 1989

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PETITIONER'S REPLY BRIEF

Petitioner National Democratic Policy Committee ("NDPC") submits this reply to the United States' brief in opposition to NDPC's petition for a writ of certiorari.

1. The United States does not dispute that the opinion of the First Circuit in this case is in direct conflict with the opinion of the Ninth Circuit in *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988). The Ninth Circuit, of course, held that civil contempt controversies become moot upon the expiration of the grand jury's term; the First Circuit rejected that rule, holding in this case that a judgment imposing a civil contempt fine may

be entered even though the grand jury expired many months before.[1]

2. The United States, in a sixteen-page brief in opposition, has not identified facts to show clearly and convincingly (or minimally) that NDPC possessed or controlled index cards not produced to the grand jury. Indeed, counsel for the United States has been careful not to say that the index cards belonged to NDPC, venturing only to say at page 5 of the brief in opposition that the cards were found at "offices . . . that were associated with the suspected illegal fundraising for Lyndon LaRouche." Those were not NDPC's offices, and nothing in the record is to the contrary. The United States depends, as does the First Circuit opinion, upon the observation that NDPC did not "disavow" the index cards. That is completely irrelevant to the existence in the record of evidence that NDPC withheld index cards from a grand jury.[2]

3. At page 9, note 8, the United States notes that its motion to recompute NDPC's fine is under advisement. That is not correct. On September 13, 1989, the district court recalculated NDPC's fine at $2,770,000. The district court again denied the hearing requested by NDPC and based its order on *in camera, ex parte* submissions, over NDPC's objection. (The district court's order is reproduced herein.)

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[1] The United States identifies no precedent in which a civil contempt fine has been imposed after the relevant grand jury expired. The United States also fails to confront its failure in this case even to move for the imposition of a fine until many months after the grand jury expired.

[2] The United States observes that "a number" of the index cards referred to NDPC. The "number" was two, and only two. Whatever the references meant, they did not establish that NDPC was responsible for any of the cards or that it should have been fined.

For these reasons, and those more fully stated in the petition for a writ of certiorari, NDPC requests that the petition be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 85-203 - 206

IN RE: GRAND JURY PROCEEDINGS
(CAUCUS DISTRIBUTORS, INC., *et al.*)

MEMORANDUM AND ORDER

Mazzone, D.J. September 13, 1989

On February 26, 1987, I entered, upon motion of the United States of America, an Order of Partial Judgment in the above referenced proceedings, which represented contempt judgments against Caucus Distributors, Inc. (Caucus"), Campaigner Publications, Inc. ("Campaigner"), Fusion Energy Foundation ("Fusion"), and the National Democratic Policy Committee ("NDPC") (collectively referred to as "the contemnors"), for their failure to comply with grand jury subpoenas served upon them by the United States. In an opinion dated March 29, 1989, the United States Court of Appeals for the First Circuit upheld my imposition of contempt fines against the contemnors but vacated the judgments and remanded these proceedings for a recomputation of the aggregate fines and to exclude from the judgments fines which accrued after the life of the grand jury. *In re Grand Jury Proceedings (Caucus Distributors, Inc., et al.)*, 871 F.2d 156 (1st Cir. 1989).

On April 27, 1989, the United States filed a Motion for Computation of Aggregate Contempt Fines supported by the Affidavit of AUSA Peter E. Gelhaar, the latter

document being filed under seal. Action on this motion was deferred until July 3. 1989, pending contemnors ultimately unsuccessful petition to the United States Supreme Court for a writ of certiorari. Following the denial of their petition for certiorari, contemnors filed a motion in opposition both to the imposition and recalculation of the fines and to the sealing of Mr. Gelhaar's affidavit. I am not persuaded by their arguments. The entire record presents a picture that warrants the imposition of these fines. Further argument or hearing is not necessary. L. R. 17(d).

Having reviewed the record, including the sealed affidavit and copies of other court documents, I find that the grand jury which issued the subject subpoenas with which the contemnors failed to comply, expired on January 10, 1986. I therefore find, in accordance with the aforementioned opinion of the court of appeals, that the per diem contempt fines may accrue against the contemnors to and including January 10, 1986. Accordingly, it is hereby

ORDERED that the Order of Partial Judgment which entered on February 26, 1987, be modified as follows:

1. The amount of the judgment which entered against Campaigner Publications, Inc., formerly in the amout of $5,110,000 shall be and hereby is reduced to $2,770,000 for Campaigner's failure to comply with the grand jury subpoena from April 9, 1985, to and including January 10, 1986 (277 days at $10,000 per day);

2. The amount of the judgment which entered against Fusion Energy Foundation, formerly in the amount of $5,110,000, shall be and hereby is reduced to $2,770,000 for Fusion's failure to comply with the grand jury subpoena from April 9, 1985, to and including January 10, 1986 (277 days at $10,000 per day);

3. The amount of the judgment which entered against the National Democratic Policy Committee formerly in

the amount of $5,110,000, shall be and hereby is reduced to $2,770,000 for NDPC's failure to comply with the grand jury subpoena from April 9, 1985, to and including January 10, 1986 (277 days at $10,000 per day);

4. The amount of the judgment which entered against Caucus Distributors, Inc., formerly in the amount of $6,055,000, shall be and hereby is reduced to $2,610,000 for Caucus' failure to comply with the grand jury subpoena from April 25, 1985, to and including January 10, 1986 (261 days at $10,000 per day).

IT IS SO ORDERED.

/s/ David Mazzone
United States District Judge